

IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE OFFICE PLANNING GROUP, INC.,

Plaintiff/Appellee

Supreme Court No. ~~125502~~ 125448

vs.

Court of Appeals No. 245155

ROD LIIMATAINEN / BARAGA -
HOUGHTON - KEWEENAW CHILD
DEVELOPMENT BOARD, INC.

Lower Court Case No. 01-11593- CZ

Defendants/Appellants

DEFENDANTS/APPELLANTS' REPLY BRIEF

ORAL ARGUMENT - SCHEDULED FOR NOVEMBER CALL

CERTIFICATE OF SERVICE

**JOHNSON, ROSATI, LABARGE,
ASELTYN & FIELD, P.C.**

BY: MARCIA L. HOWE (P 37518)
Attorney for Defendants/Appellants
34405 W. Twelve Mile Road, Suite 200
Farmington Hills, Michigan 48331-5627
(248) 489-4100

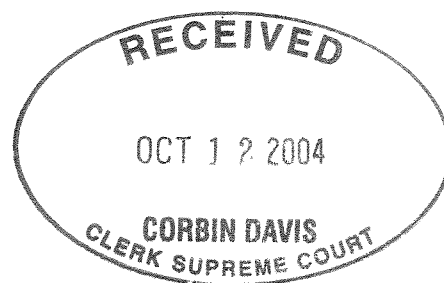


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STATEMENT OF BASIS OF JURISDICTION

Defendant filed a Claim of Appeal by Right under MCR 7.203(A)(1) from an Order Following Consideration of Defendant's Motion for Summary Disposition entered on November 7, 2002. This Order is a final Judgment disposing of all claims and adjudicating the rights and liabilities of all parties under MCR 7.202(7)(a)(I).

The Claim of Appeal was timely filed within 21 days thereafter on November 27, 2002. The Michigan Court of Appeals issued its Opinion on November 4, 2003. A timely Motion for Reconsideration was filed and then denied on December 10, 2003. Pursuant to MCR 7.301(A)(2), this Court has jurisdiction from a timely Application for Leave to Appeal was filed on January 19, 2004, which was granted on July 1, 2004.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE COURTS LACK JURISDICTION OVER A DISPUTE UNDER 42 USC 9839(a) FOR REASONABLE PUBLIC ACCESS TO THE BOOKS AND RECORDS OF A PRIVATE, DELEGATED HEAD-START AGENCY RECEIVING FEDERAL FUNDS FOR ITS SERVICES?

Appellants BHK state: "Yes."
Appellee OPG states: "No."
Trial Court states: "No."
Court of Appeal states: "No."

II. WHETHER THE DISCLOSURE OF ALL BIDS SUBMITTED FOR OFFICE FURNITURE WAS REQUIRED UNDER THE PLAIN MEANING OF 42 USC 9839(a) WHERE IT DOES NOT EXPRESSLY APPLY TO DELEGATED HEAD-START AGENCIES, DOES NOT AUTHORIZE A PRIVATE ENFORCEMENT ACTION FOR THE GENERAL PUBLIC, AND ITS PURPOSE TO PROTECT THE EXPENDITURE OF FEDERAL FUNDS IS SERVED BY HHS' AUDITING REGULATIONS?

Appellants BHK state: "Yes."
Appellee OPG states: "No."
Trial Court states: "No."
Court of Appeal states: "No."

III. WAS REASONABLE PUBLIC ACCESS TO BHK'S RECORDS AND DOCUMENTS UNDER 42 USC 9839(a) PROVIDED WHEN IT DISCLOSED ITS PROCUREMENT POLICY, CONDUCTED PUBLIC HEARINGS, AND ANNOUNCED THE AMOUNT OF THE WINNING BID FOR OFFICE FURNITURE?

Appellants BHK state: "Yes."
Appellee OPG states: "No."
Trial Court states: "No."
Court of Appeal states: "No."

STATEMENT OF FACTS

OPG wanted to see the contents of all submitted bids for office furniture after it learned that its \$71,000.00 bid was higher than Commercial Office Interiors' winning bid of \$54,000.00. (10/15/02 hrg., p. 86-87, 133, 143, APX. p. 104a-105a, 151a,161a). Commercial Office did not want its bid revealed. It has not been disclosed. (Id, p. 101, 104, p. 119a, 122a) Commercial Office's bid offered Herman Miller products, whose prices were available on internet. Because OPG could access those, it initially sought only the items bid on. (10/15/02 hrg., p.133-134, 141, 144-145, APX 151a-152a;APX p 159a, 161a-162a). Now, it wants the prices too. (Id, p. 141, APX p. 159a).

OPG incorrectly minimizes the legal questions presented based upon BHK's Director's somewhat ambiguous statements that maybe the public could see the bids in future meetings. First, the question is whether BHK *is legally mandated* to disclose to the general public the contents of each bid, not whether it would be inclined to do. Secondly, the Director's testimony was based upon hypotheticals and his response was qualified and speculative. "*I believe* if he was a member of the public..."....it could be disclosed. (10/15/02 hrg. p. 121,APX 139a). Thirdly, OPG did not show that the Director was authorized to make that decision where a Board or committee is present. BHK's sincerity and concern on this issue is demonstrated by its commitment to the continuation of this litigation. (10/15/02 hrg. p 106, APX 124a)

The facts are that BHK's customary practice has been to initially open and review bids outside of the public meeting, then review it at the public meeting, and publicly announce only the amount of the winning bid. Bid contents were customarily not disclosed to the public to avoid disclosing information to the bidder's competitors. (10/15/02 hrg. p 80-81, 83, 87-89, 113-117, APX p. 98-99a, 101a, p. 105a-106a, 132a-138a.) Moreover, OPG's request to compare items, apples to

apples, in the bids is impossible because the difference is in the details. (Id, p. 88-89; 106a-107a; Engr., p. 127, 145a). Here, BHK accepted the lowest, competent bid.(Id., p. 9, APX p. 110a) The system's integrity is protected by the numerous volunteers on the committees, the Board and the published information. (Id, p. 93, 105-107, 109, APX p. 111a, 123a-125a, 127a). OPG argues as if BHK is a 'public body' like Michigan Tech, but the Judge that neither the state nor federal FOIA applied. (10/15/02 hrg. p. 120, APX 138a).

I. THE LANGUAGE OF 42 USC 9839(a), DOES NOT MANDATE DISCLOSURE OF THE CONTENTS OF THE FURNITURE BIDS SUBMITTED.

The purpose of §9839(a) for efficient administration and public scrutiny of federal expenditures is served by BHK's procurement policy enacted under the federal regulations and followed by numerous, concerned local volunteers serving on committees and the Board. (10/15/02 hrg. p. 105, APX p. 123a). Annual independent audits of BHK serves as a check and balance fund expenditures. 42 USC 9831 *et seq.* authorizes only the HHS to be the watchdog or enforcer of the duty to provide reasonable public access, not the general public.

II. THE STATE COURT SHOULD DEFER TO THE FEDERAL AGENCY AND COURT.

Under 42 USC 9839(a), the agency is responsible to provide reasonable public access to records and book. Its determination is first reviewable by the HHS, who created the standards, and then, is subject to review by the federal courts under 5 USC 702.¹

¹When legal rights are affected, a final decision should be appealed. 1 B Fed Proc Form Sec. 2.128-2.132. BHK's actions and the HHS director's letters constitute agency action under 5 USC 551, broadly defining the terms: order (5 USC 551(6); adjudication (§551(7); rules (4), relief (11), agency action and proceeding (12 & 13). Interpretation of these federal matters is not within a conventional state court experience. 1 Mich Pleading and Practice, §518 (2nd Ed.), §22:28, deference to administrative agencies).

Uniformity. The expenditures of federal funds are scrutinized under the HHS statute, 42 USC 9831 *et seq.*, the Office of Management and Budget regulations, such as 45 CFR 74.1-7.53, and the local agency's procurement policies and procedures. Each department continually generates regulations, reports, policy statements, and circulars. Expertise is not only 'technical', but in that complicated regulatory morass, administrative expertise is not only necessary, it is required. This special 'administrative' competence of an administrative body under an established regulatory scheme should be respected. Travelers Ins. Co. v Detroit Edison Co, 465 Mich 185; 63 NW2d 733 (2001). Only in that context of the HHS' substantive goals can the term "reasonable public access" be understood and applied. If the HHS had been a Defendant, it could have defended its position. (APX p. 221a-230a). But, by its letters, OPG recognized that, on its face, §9839(a) assures only a general obligation for Head-Start agencies to provide reasonable public access. On its face, it neither authorizes a private lawsuit nor designates a forum for enforcement. Rather, the HHS administrative system provided the enforcement opportunity for seeking relief from the local agency's administrative decision under §9839(a). A process OPG had started, but never finished. (Id.).

Moreover, BHK, at the local level, provided sufficient public scrutiny by relying on its approved procedures implemented by the Board and various committees. Here, the Building Committee, including several people and an engineering consultant firm, evaluated and recommended awarding Commercial Office Interiors the bid in a public meeting. (10/15/02 hrg., p. 81-83, APX. p. 99a-101a.). Later, it was accepted, as the lowest, competent bid by the Board, which could accept or reject any and all bids, award bids that are in its best interest, and waive formality. (10/15/02 hrg., p. 84, APX. p. 102a, p. 181a). The Director did not control the process or the outcome further undermining OPG's suggestion that he would control disclosure of the bid contents

at the meetings. It is more likely that the uniform and customary rule would continue to apply and the bids would not be disclosed at the meetings to the general public. Otherwise, immaterial and personal disruptions over administrative minutia defeats efficiency and hampers the uniform enforcement of §9839(a), which of itself undermines confidence in the system. Local, self-interest concerns and disputes could create havoc.

Importantly, this case is not about OPG's access; it is about the general public's right to second-guess and flyspeck BHK's records and actions. BHK strongly believes that it was not under an obligation to disclose, not that it was a mere bother to copy the bids. The Director's 26 years of experience taught him that §9839(a) did not require disclosure. (10/15/02 hrg., 91-94, 109a-112a). The non-disclosure rule has been followed uniformly. (Id. p. 104, APX p. 122a). The big picture must be viewed to avoid allowing the bidders to side-step federal court while taking a home-court advantage if the unsuccessful bidder is local and the competitors are not. Local judicial intervention may unintentionally not be uniformly applied.

Potential Adverse Affect on Agency's Ability to Regulate. Assuming for purposes of argument that the OMB's Circular A-110 and 45 CFR 74.53 suggests that the FOIA precedent is not totally irrelevant to general agency administrative practice, the FOIA exemptions under 5 USC 225(b)(4) of trade secrets and commercial/financial information would apply when it involves voluntarily submitted information that is of the nature not customarily disclosed to competitors, and it might inhibit any future flow of information to the government, or cause substantial harm to the competitive position of the person from who the information is requested.

In United Technologies Corp v FAA, 102 F 3d 688 (CA 2, 1996), cert. denied 117 S Ct 2479; 138 L Ed 2d 998 (1997), disclosure of third-parties' design drawings submitted with

applications to make replacement parts for manufacturer's engine was exempt, even if the manufacturer had knowledge of the information, because it could cause harm to the competitive process. Actual competitive harm from disclosure need not be shown. GC Micro Corp v Defense Logistics Agency, 33 F 3d 1109 (CA 9, 1994). In Nadler v FDIC, 92 F 3d 93 (CA 2, 1996), the mere potential to hinder the commercial success of the real estate project precluded disclosure.

Other similar cases prohibited disclosure. In Environmental Technology Inc v EPA, 822 F Supp 1226 (ED Va. 1993), a company awarded environmental clean-up contract, after voluntarily giving information to the EPA that it would not normally share with its competitors, would not have to disclose it. In Gulf & W Industries v US, 615 F2d 527 (DC 1980), the firm's actual profit rate, loss data, general and administrative expense rates, projected scrap rates and learning curve data were considered exempt because disclosure negatively impacted competition. In Professional Review Organization Inc v HHS, 607 F Supp 423 (DCDC, 1985), the information about the manner that the contractor intends to conduct its business, non-technical information, was exempt where there was actual competition and a likelihood of substantial injury could be caused by disclosure. Where disclosure of water resources and mining operation information on tribal land would inhibit competitive bids, it was exempt. Starkey v Department of Interior, 238 F Supp 2d 1188 (SD Cal, 2002). Pricing matrixes of long-distance telephone services was exempt and withheld from the competitor making the request. MCI WorldCom, Inc. v General Services, 163 F Supp 2d 28 (D DC, 2001). Where a private corporation did not customarily disclose employment documents, a document evidencing the adverse impact of downsizing on employees was exempted. McDonald Douglas Corp v US EEOC, 922 F Supp 235 (ED Mo, 1996); Cortez III Service Corp v Nasa, 921

F Supp 8 (D DC, 1996). The sensitive nature of financial information clearly falls within that class.

Nadler, supra.

Here, OPG, as a competitor, sought information, not to scrutinize the expenditure, but to advance its own competitive goals. Stunned by the lower bids, it sought information for a purely private reason. (10/15/05 hrg., p. 134, 141, 145, APX. p. 152a, 156a, 160a). OPG, who initially wanted limited information, later wanted complete disclosure, including prices and even though the manufacturer's prices were readily available on the internet. (Id, p. 145, APX. 163a.). Yet, BHK customarily had not revealed the bid contents to the public, except the brochures and supplementation. (10/15/02 hrg., p. 87, 99, 113-114, 105-106, APX. p. 105a, 116a-117a, 123a-124a, 131a-135a.) Commercial Interiors voluntarily provided information to BHK for bid purposes only and it was not customarily released to the general public. In fact, OPG argued that bid was opened outside the public meeting. (Id, p. 130, APX p. 148a). In reality, OPG seeks to undercut its competitor by learning its competitor's bidding strategy and per unit pricing.

Disclosure was objected to because BHK will be unable to obtain competitive bids in the future if the competitors are forced to revealed their competitive secrets. Bidders, such as Commercial Interiors, will be forced to reveal quoted unit prices, which permits calculation of their profit margins, which may be incomparable to the products offered by OPG, but useful to provide insight into a competitor's bidding strategy. OPG admitted that the Herman Miller prices are on line and accessible.

This disclosure may benefit the competitive process, but only in the very short term. Knowing the bidding unit price and the on-line recommended price will give OPG a competitive advantage in the future, which Commercial Interiors may be unable or unwilling to overcome. In

the future, bidders will be unwilling to come forward if they have to contend with the prices previously bid or if their product manufacturer frowns upon special discounts to certain customers. It is even less likely that bidders will be willing to provide an extremely low price to silently donate to a good cause if it is used against them in the future by their competitors. Less selection in materials and less competitive prices ultimately results. (10/15/02 hrg. p. 90-91, 119, APX p. 108a-109a, 132a).

Importantly, this question of disclosure is not to be considered narrowly in the context of these facts based upon the concern of this one unsuccessful bidder. On the contrary, the principles apply on a broader level of whether BHK or its bidders will be hurt by compelling disclosure to the general public, especially since OPG argues that §9839(a) was intended to benefit the general public. Consequently, any member of the public can calculate the differential between the manufacturer's suggested prices on the internet and the quoted price. This is the profit margin, in this case being sacrificed for a good cause or a silent gift. (10/15/02 hrg., p90-92, APX 108a-110a). The calculation undermines the competitive process when the actual amount charged to one 'special' customer becomes public knowledge. (Id. p 118-121, APX p. 136a-139a). It creates competition problems for future bids, political problems with the manufacturers and the other customers, and reveals the bidders competitive strategy. The non-profit organizations serve the disadvantaged are able to seek individual and community philanthropy, albeit ever so quietly, through the process. Publicizing with details that personal or corporate sacrifice is a real threat to the bidder and to BHK and defeats the good public policy in giving gifts in kind. The Court discounted this rationale because the court saw no reason a company would want its good deed to go unnoticed. But the good deeds will be lessened if it competitively harms the giver in the grand scheme of things. The

successful bidder did not want its bid contents revealed for that reason. The HHS, the long time administrator of such programs, is cognizant of those concerns and is better suited to determine whether disclosure is advantageous to either the general public, the successful bidder, or the local agency. Lastly, if the FOIA is in any way applicable, then OPG should have followed the administrative procedures outlined by the HHS FOIA Director and filed its appeal. (APX 228a).

The facts support deference under the Chevron Doctrine. The HHS Program Officer in the regional office and Director of Family and Child Development impacted OPG's alleged right by their decisions that §9839(a) and 45 CFR 1301.30 did not require exposure of the bid details or explain why a bidder was selected. (APX. p. 221a, 230a). The FOIA Director advised OPG to appeal. (APX p. 228a). BHK reasonably relied on those letters. But rather than appeal or exhaust it available administrative remedies within HHS to obtain a 'final' decision, seek a board of review determination, or obtain judicial review under 5 USC 702², OPG collaterally attack it at the local, state court - looking for a more sympathetic ear. BHK found these communications binding and, at a minimum, subject to judicial review under 5 USC 701 *et. seq.* A failure to act or decision not to proceed by rule making is a final decision, *infra.* n.1³, appealable under 5 USC 701 *et. seq.*. An action taken by a responsible decision maker with a practical effect of disposing of the matter before the agency is final. NLRB v Sears, Roebuck, 421 US 132; 44 L Ed 2d 29; 95 S Ct 1501 (1975).

²If the FOIA applied, the 5 USC 552 applies. General administrative orders, rules, etc. are appealed under 5 USC 701 *et seq.*, which supports BHK's argument that the disclosure determination is within the sole discretion of the agency and unreviewable at all.

³See 2 Fed Proc L Ed 2; 138-140, adjudication and informal adjudication of administrative decisions.

Timeliness. Jurisdiction was raised below. (8/16/02 hrg. p. 55-60, APX. p. 71a-76a; Motion to Compel, 4/1/02, p. 28-29, APX. p. 42a-43a; Court of Appeals Opinion, p. 6, APX. p. 174a.)

III. §9839 DOES NOT CONTAIN A PRIVATE CAUSE OF ACTION.

OPG's reliance on Gillis v HHS, 759 F 2d 565 (CA 6, 1986) as authority for a private cause of action under §9839(a) is misplaced. Gillis supports BHK's arguments: 1) It precluded an implied cause of action for a member of the general public under the Hill-Burton Act's, 42 USC 291, investigation and enforcement provision because it failed to expressly create one and would allow litigants to avoid the available procedures in the same Act, and; 2) It shows that OPG should appealed under 5 USC 702. Gillis is an appeal of an agency decision under the administrative agency provisions, 5 USC 706, and notes that actions where there are not adequate remedies available are appealable under 5 USC 704. Gillis makes clear that OPG's remedy was in federal court. If OPG argues that BHK deserves the disclosure burdens of a 'public entity', then it is only fair that BHK be permitted to rely on the benefits available to 'public entities' in its defense. If OPG cannot enforce §9839(a) against the HHS, it cannot enforce it against BHK.

IV. BHK ALLOWED REASONABLE PUBLIC ACCESS TO ITS RECORDS AND DOCUMENTS.

BHK's Director demonstrated that appropriate procedures were utilized that guaranteed fairness and prevented deception. The lowest, competent bid was accepted. It was publicly reviewed by a variety of community volunteers serving on the Board and committees, BHK's knowledgeable staff, and the engineering consultant. The amount of the successful bid was adopted and announced at a public meeting, which was publicly noticed. (Id, p. 107, APX p. 125a). The meetings and

minutes from them are publicized and rules are followed. (Id., p. 93, 95, APX p. 111a-113a). Two people open and inspect the bids initially, including a non-BHK person. (Id, p. 117, APX p. 135a).

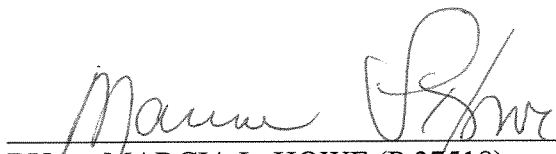
Specifically here, no evidence of impropriety was shown. The consulting engineer testified that the prices submitted were reasonable within the general practices and evidenced no wrongdoing. (10/15/02, p. 125-128, APX 143a-147a). It was explained that the furniture bids are complicated and involve minor details so matching unit for unit is not possible. (Id, p. 127, 145a). OPG admitted that BHK's Director was very helpful and tried to do business locally, if he could. Significant communications occurred in an attempt to advance both parties' interests, i.e., provide a local business with financial opportunity while getting the best, competitive price for BHK. (10/15/02 hrg., p. 132-134, APX. p. 150-152a.).

CONCLUSION

BHK respectfully requests this Court reverse the lower court decisions.

Respectfully Submitted,

**JOHNSON, ROSATI, LABARGE,
ASELTINE & FIELD, P.C.**

A handwritten signature in dark ink, appearing to read "Marcia L. Howe", is written over a horizontal line.

BY: MARCIA L. HOWE (P 37518)
Attorney for Defendant/Appellant
34405 W. Twelve Mile Road, Suite 200
Farmington Hills, Michigan 48331-5627
(248) 489-4100

Dated: October 12, 2004

REQUEST FOR BIDS 1-6-01

B-H-K Child Development Board requests bids for office furniture, partition or cubicles, and cabinets. Specifications are available and bids are due by 4:00 p.m., January 15, 2001, at B-H-K Child Development Board, 700 Park Avenue, Houghton, MI 49931, 906-482-3663 or 1-800-236-5657.

The Board may accept or reject any bids, award bids that are in its best interest and waive informalities.